In the Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted]

GILBERTVILLE TRUCKING CO., INC., THE L. NELSON & SONS TRANSPORTATION COMPANY, CHARLES G. CHILBERG, CLIFFORD J. O. NELSON, GRETA C. CARLSON, and KENNETH A. H. NELSON,

APPELLANTS,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

HENRY E. FOLEY
LOYD M. STARRETT
WILLIAM G. BUSS, JR.
10 Post Office Square
Boston 9, Massachusetts
Counsel for Appellants

MARY E. KELLEY
10 Tremont Street
Boston 8, Massachusetts
Of Counsel

Blanchard Printing Company, Boston, Mass. — Law Printers

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Table of Citations

Statutes

Legislative History

In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 542

GILBERTVILLE TRUCKING CO., INC., THE L. NELSON & SONS TRANSPORTATION COMPANY, CHARLES G. CHILBERG, CLIFFORD J. O. NELSON, GRETA C. CARLSON, and KENNETH A. H. NELSON,

APPELLANTS,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

This is a direct appeal from a final judgment of a three-judge United States District Court for the District of Massachusetts which dismissed appellants' suit to enjoin and set aside certain orders of the Interstate Commerce

Commission. The challenged decision of the Commission held that appellants had violated the prohibition of sections 5(4), 5(5) and 5(6) of the Interstate Commerce Act,[1] denied an application for approval pursuant to section 5(2) of the Act (49 U.S.C. § 5(2)) of a proposed merger of appellants Gilbertville Trucking Co., Inc. ("Gilbertville Co.") and The L. Nelson & Sons Transportation Company ("Nelson Co."), and directed divestiture of the stock of Gilbertville Co., all of which is owned by appellant Kenneth A. H. Nelson.

Appellants' Jurisdictional Statement raises a number of important questions concerning the soundness of the Commission's denying the section 5(2) application automatically on the ground that a violation of law had been found and without weighing other factors indicating that the proposed merger would be in the public interest or considering the innocent nature of the violation found, the appropriateness of the District Court's finding facts and relying upon a legal theory different from the facts found and theory relied upon by the Commission, and the adequacy of the Commission's findings and of their support by the evidence.[2] Appellees, in a Motion to Affirm, essentially contend, not that the questions raised are insubstantial, but that the District Court's decision was correct. This Brief

---

[1] 49 U.S.C. §§ 5(4), 5(5), 5(6). The relevant sections of the Interstate Commerce Act and the Administrative Procedure Act are set forth in Appendix B (pp. A-82 - A-86) of appellants' Jurisdictional Statement.

[2] Appellees' statements (Motion to Affirm pp. 7, 8) that "[t]he Commission's subsidiary factual findings have never been contested by appellants" are unsupported by the record. Appellants have challenged the Commission's findings both as inadequate and as unsupported by substantial evidence in their petition to the Commission for reconsideration filed August 17, 1959, in the District Court and in this Court (Jurisdictional Statement pp. 22-34, 40-48). Indeed, appellants have demonstrated in their Jurisdictional Statement (pp. 40-48) that two of the findings appellees paraphrase and rely on (Motion to Affirm p. 8) are unsupported by substantial evidence.

is respectfully submitted in reply to the arguments made in that Motion to Affirm.[3]

Argument

A.

Appellees (Motion 8) urge this Court to deny plenary review of the decision of the District Court because the same *conclusion* was reached, on *one* of the issues involved, by the Examiner, Division 4, the full Commission and the District Court. Apparently appellees, by their emphasis on that coincidence, hope to disguise the really significant fact—that each of the four previous decisions in the present case has been based on findings of fact and legal theories different from the findings and theories relied upon by the preceding decision. The four decisions below completely failed to agree as to what violation of law had occurred, or how or when it had occurred, or what ought to be done about it.[4]

---

[3] Appellants' Jurisdictional Statement and appellees' Motion to Affirm (including their respective appendices) will be cited herein as "J. St." and "Motion", respectively, followed by the number of the page cited.

[4] The decisions themselves admit that they agree only as to ultimate conclusion. Thus Division 4 said "We concur in the examiner's *conclusion* that Nelson and Gilbertville are controlled or managed in a common interest in violation of section 5(4)". (Motion 14b) (Emphasis added.). That the Commission affirmed the prior decisions only as to their conclusions stated in statutory language is shown by the Commission's statement — "we affirm the findings . . . *that* the control and management of Nelson and Gilbertville in a common interest has been effected and is continuing in violation of section 5(4)" (Motion 29b-30b) (Emphasis added.) — as well as by the fact that the "affirmed" prior decisions were different. And the District Court's decision affirmed merely "the ultimate finding made by the I.C.C. [i.e., "the I.C.C.'s ultimate and essential finding 'that the control and management of Nelson and Gilbertville in a common interest has been effected and is continuing in violation of section 5(4)'" (J. St. A-18)] and

The three decisions within the Commission were all quite different. The Examiner, relying on subsection 5(5)(a) and section 5(6), concluded that "at some time which cannot be determined on this record" there had been an innocent violation of section 5(4) which, although "presumably" continuing, did not warrant a finding of unfitness or denial of the section 5(2) application. He held that the proposed merger should be approved and the investigation proceeding should be terminated. (J. St. A-61—A-63, A-69, A-72, A-79, A-80). Division 4, without reference to any part of section 5(5) or to section 5(6), found a section 5(4) violation and held that *ipso facto* the section 5(2) application should be denied. (Motion 14b-16b). The Commission, obviously dissatisfied with Division 4's prior report, on reconsideration substituted a new report based exclusively on "the conclusive presumption" of subsection 5(5)(b) and section 5(6), and finding a violation "at the time he [Kenneth] purchased the stock of Gilbertville". (Motion 29b). The Commission, without a word of explanation, also added a decree of divestiture of the stock of Gilbertville Co. And while the legal theories were being changed, so were the facts. The Commission substituted a new and different "narrative statement" of facts for Division 4's "narrative statement", and Division 4's statement had differed substantially from the Examiner's findings.

Moreover, only four of the eleven Commissioners agreed with the Commission's report on reconsideration. Three Commissioners dissented, three, including the Commissioner who dissented from the two-to-one decision of Division 4, did not participate, and one concurred only in the result.

---

the derived legal *conclusion* announced by the I.C.C." (J. St. A-19) (Emphasis added.), not because they were based on findings of fact supported by substantial evidence and on sound reasoning, but because the District Court, by its findings of fact and its reasoning, found them "not merely reasonable but inevitable to an unprejudiced, sophisticated mind." (J. St. A-19)

The District Court in turn, ignoring this Court's oft repeated ruling that "a judicial judgment cannot be made to do service for an administrative judgment",[5] found facts and relied upon a legal theory different from the facts found and theory relied upon by the Commission.

Appellants have conclusively demonstrated (J. St. 11-20) that the District Court disregarded some of the Commission's findings of fact and made *de novo* (and erroneous) findings of fact different from other findings of the Commission. Some of these *de novo* findings by the District Court were made by inferring, erroneously, that facts "not shown" before the Commission would, if shown, have been harmful to appellants;[6] thus the District Court held, contrary to section 7(c) of the Administrative Procedure Act (5 U.S.C. § 1006(c)), that the appellants, as respondents in the section 5(4) investigation, had the burden of proof before the Commission. Indeed, appellees admit (Motion 10-11, n. 4) that the District Court decided the case on facts different from those found by the Commission. And, although appellees attempt to characterize the District Court's *de novo* findings as "immaterial variations", plainly the District Court regarded its *de novo* findings as the most significant facts in the case. (See J. St. A-10, A-12).

That the District Court employed a legal theory different from the Commission's is, as appellants have shown (J. St. 8-10, 20-21), obvious from examination of the respective opinions: on one hand, the Commission relied exclusively upon the definition of "affiliated" in section 5(c) and "the

---

[5] *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 88; see, e.g., *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 270.

[6] The District Court's "not shown" language (see J. St. 17-18 & n. 8) is the same as the language of the Commission recently condemned by this Court in *Interstate Commerce Commission* v. *J-T Transport Company, Inc.*, 368 U.S. 81, 90.

conclusive presumption of section 5(5)" (Motion 29b); on the other hand, the District Court's "reasoning does not . . . require resort to any legislatively enacted definitions or presumptions." (J. St. A-19).

Two of the three arguments with which appellees try to justify the District Court's decision—that the Commission's decision was on alternative grounds and that the District Court decided on alternative grounds—are too obviously inconsistent with the Commission's report on reconsideration and the District Court's opinion to require extended discussion in this Brief.[7] And appellees' third argument—that the difference in rationale makes no difference because sections 5(5) and 5(6) "are but specific examples" of common control prohibited by section 5(4) (Motion 9)—not only requires the unsound assumption that Congress would insert and maintain repetitive sections in the Interstate Commerce Act, but also ignores the plain meaning of the sections. Section 5(4), read alone, prohibits "control or management in a common interest of any two or more carriers"; whether that prohibition is violated is a question of fact and depends upon what is actually true. Sections 5(5) and 5(6), however, in effect prohibit the acquisition of a carrier by any person who has a "relationship" with

[7] Appellees' theory seems to be that the Commission's recitation of affirmance of the ultimate findings or conclusions of prior decisions, phrased in the language of the statute, constitutes an adoption of the reasoning of those prior decisions as alternative grounds of the Commission's decision. But the Commission did not purport to affirm anything but the conclusion that the statute had been violated, and indeed the obvious purpose of the Commission's report on reconsideration was to substitute a different narrative statement and different reasoning based on sections 5(5) and 5(6). Moreover, read in context, the Commission's recitation of affirmance is simply the third step of the Commission's own conclusion — that it found Kenneth "affiliated" as defined in section 5(6), wherefore "the conclusive presumption of section 5(5) applies", wherefore the Commission found what section 5(5) conclusively presumes, a violation of section 5(4). See also note 4 *supra*.

another carrier if "it is reasonable to believe" certain things will happen. In other words, there is a violation by reason of section 5(4) alone only if certain facts actually exist, whereas there is a violation by reason of sections 5(5) and 5(6) if, and only if, certain things can be predicted.

Although Congress, as a drafting technique, inserted in section 5(6) a definition and in section 5(5) created a conclusive presumption of a section 5(4) violation based on the definition in section 5(6), Congress was well aware that the sections 5(5) and 5(6) prohibition was different from the section 5(4) prohibition. Both congressional reports state that the provisions which are now sections 5(5) and 5(6) "are necessary" in addition to what is now section 5(4). S. Rep. 87, 73d Cong., 1st Sess. at 9; H.R. Rep. 193, 73d Cong., 1st Sess. at 16. The special counsel for the House Interstate and Foreign Commerce Committee, who was one of the draftsmen of the provisions which are now sections 5(4), 5(5) and 5(6) and was their principal opponent in the hearings, stated that "it is the purpose of subdivision (b) [now section 5(5)] to establish as a rule of law that certain transactions which it might be argued do not come within the provisions of subdivision (a) [now section 5(4)] are to be considered as accomplishing or effectuating control or management in violation of subdivision (a) [now section 5(4)]." A number of examples of transactions which would be reached only by the sections 5(5) and 5(6) prohibition were given in the hearings and the House Report. *Hearings on H. R. 9039 Before the House Committee on Interstate and Foreign Commerce*, 72d Cong., 1st Sess. at 32-37; H. R. Rep. 193, 73d Cong., 1st Sess. at 17.

The prohibition of sections 5(5) and 5(6) obviously is, as Congress intended it to be, conceptually entirely different from the prohibition of section 5(4). A decision based on violation of the prohibition of sections 5(5) and

5(6)—such as the Commission's decision in the present case—inevitably is entirely different from a decision based on violation of the prohibition of section 5(4) alone—such as the District Court's decision in the present case. Different questions of basic fact are relevant to the two decisions, and they pose different questions of ultimate fact and law.

Plainly issues which create such dissension within the Commission itself and create such disagreement among the Examiner, the Division, the Commission and the reviewing court not only warrant, but indeed require, plenary consideration and authoritative resolution by this Court.

B.

Section 8(b) of the Administrative Procedure Act (5 U.S.C. § 1007(b)) requires that all decisions of the Commission[8] state "findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record". Appellants have demonstrated (J. St. 22-34) that the Commission failed to make the findings required by section 8(b) as to three fundamental issues: (1) There is no statement of the "reasons or basis" for the ultimate finding that Kenneth was "affiliated" with Nelson Co. (2) There is no adequate finding that any violation was continuing. (3) There is no finding of any kind that it was "necessary" to require Kenneth to divest himself of the stock of Gilbertville Co.; indeed, the Commission's report does not even indicate that divestiture will be ordered. Appellees do not even cite the Administrative Procedure Act or claim that the Commission complied with the requirements of section 8(b). Just as the Commission's decision completely disregarded the requirements of the Administrative Procedure Act, appel-

[8] See, e.g., *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 192.

lees in their Motion to Affirm have completely ignored the very existence of those requirements:

1. The definition in section 5(6) of the Interstate Commerce Act requires, as the "basis" for finding a person "affiliated", that a certain kind of "relationship" be found; moreover, in order to invoke the conclusive presumption of section 5(5) the person must have been "affiliated", and therefore that "relationship" must have existed, when control of a carrier was acquired. Affiliation and the requisite "relationship" are clearly matters of fact which must be proved. See *Hearings on H.R. 2059 Before the House Committee on Interstate and Foreign Commerce*, 72d Cong., 1st Sess. at 33-34. In the present case the Commission stated the ultimate finding that Kenneth was "affiliated" with Nelson Co. "at the time he purchased the stock of Gilbertville". (Motion 29b). But, "an ultimate finding is not enough in the absence of a basic finding to support it",[9] and the Commission's report contains no finding of the requisite "relationship". Indeed, the facts recited by the Commission show that there was *no* "relationship" between Kenneth and Nelson Co. "at the time he purchased the stock of Gilbertville".[10]

2. Section 5(7) of the Interstate Commerce Act, pursuant to which the Commission purported to act, empowers the

---

[9] *New York Central R. Co. v. United States*, 99 F. Supp. 594, 601 (D. Mass. 1951) (Magruder, Ch. J.), *affirmed*, 342 U.S. 890. "And these basic findings should be clearly stated and identified as such, so that the reviewing court will not be groping in the dark as to the grounds for the Commission's ultimate conclusion." *Ibid.*

[10] Appellee's admit (Motion 10 n. 4) that the Commission found that Kenneth had resigned from Nelson Co. and sold his stock interest therein in 1951 and that Kenneth had ceased to serve Nelson Co. as a free-lance tariff consultant on March 1, 1953, all prior to Kenneth's purchase of the stock of Gilbertville Co. Thus appellees are unable to point to any "relationship" existing at the only time which the Commission specified — "at the time he purchased the stock of Gilbertville". Obviously appellees' suggestion that "Nevertheless, the transaction was developed earlier" cannot justify the Commission's decision that Kenneth was "affiliated" "at the time he purchased the stock of Gilbertville".

Commission to order remedial action only "to prevent continuance" of a violation found to be continuing. But in the present case the Commission has entered the harshest conceivable remedial order, requiring Kenneth to divest himself of the stock of Gilbertville Co., without making any adequate finding of a continuing violation.[11]

Appellees apparently conceded that continuance must be found, but argue "that in finding the *fait accompli* of unlawful common control, the Commission necessarily found a continuing violation". (Motion 14, n. 6). But appellees' argument ignores the fact that the private parties involved, prior to Commission action, can, and should, terminate any violation voluntarily. For example, suppose that when X purchases the stock of A Trucking Co. X has some "relationship" to B Trucking Co. but X in good faith thinks that "relationship" does not make it "reasonable to believe" that "the affairs of any carrier" which X acquires "will be managed in the interest of" B Trucking Co. and X therefore does not think he is "affiliated" with B Trucking Co. And suppose that X's attorney or a Commission investigator or someone later suggests to X that he might well be found to be "affiliated" with B Trucking Co. and therefore in violation of the law. Such a violation would be terminated upon X's severing his "relationship" with B Trucking Co., and certainly the policy of the law requires that X be encouraged to do so. After X's voluntary

[11] The requirement that a violation be continuing is both apparent on the face of section 5(7) and confirmed by the legislative history of the section. (See J. St. 27-28) Yet, as appellants have shown (J. St. 28-29), neither the Commission nor Division 4 found continuance; they both referred to the Examiner's finding. And the Examiner had not found continuance, but only *presumed* it. The Examiner had no reason to make any finding as to continuance, for he held that the section 5(2) application should be approved and no remedial order should be entered. See *Central of Georgia Ry. Co. Control*, 307 I.C.C. 39-40 (1958) ("in view of the finding in the application proceeding, . . . it was not necessary to determine whether the violation was continuing").

severance of his "relationship" with B Trucking Co., the Commission would have no jurisdiction to enter a remedial order. Moreover, in the present case, in contrast to the foregoing suppositious one, the Commission's subsidiary findings of fact show that Kenneth severed his relationship with Nelson Co. *prior to* his purchase of the stock of Gilbertville Co.

3. Section 5(7) only authorizes the Commission to "require such person to take such action as may be *necessary*, in the opinion of the Commission, to prevent continuance" of a violation found. (Emphasis added.) In the present case the Commission's order (Motion 35b) adds to the provisions of Division 4's order a direction of divestiture of the stock of Gilbertville Co., but the Commission's report does not contain even a suggestion that divestiture would be decreed, much less the reasons why divestiture is deemed necessary.

Appellants do not dispute that the Commission is given discretion by section 5(7). However, section 8(b) of the Administrative Procedure Act expressly requires "a statement of . . . findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of . . . discretion", and this Court has repeatedly insisted upon an explanation as to why a particular remedy was chosen. *E.g., Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177; *Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608; *Hughes* v. *United States*, 342 U.S. 353. Indeed, there is no indication in the present case that any discretion was exercised.

Appellees have cited, as justifying the Commission's default, two Federal Trade Commission cases, several previous decisions by the Interstate Commerce Commission, and this Court's recent decision in *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316. But none of those cases repeals the express requirement of section 8(b) of the

Administrative Procedure Act. Moreover, the Federal Trade Commission cases are completely irrelevant; they uphold an administrative agency's power to "fashion its relief to restrain other like or related unlawful acts",[12] but they do not suggest that the Interstate Commerce Commission may, without reasons, order Kenneth to sell the stock of his trucking company. The prior decisions by the ICC are all cases where the violations were blatant and willful,[13] whereas in the present case the Examiner expressly found that appellants' alleged violations of law (if any) were innocent ones.[14] Also, in each of the cited ICC decisions the Commission's report contains at least some consideration of the decree of divestiture, whereas in the present case divestiture was not even mentioned in the report. And this Court's careful weighing of the necessity for di-

[12] *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 392. The *Mandel Brothers* case decided that a defendant who had omitted 3 of 6 required items from his labels could be ordered to show all 6 required items on his labels in the future. The other case cited, *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, involved similar questions with respect to an order in a price discrimination case.

[13] In *Central of Georgia Ry. Co.*, 307 I.C.C. 39 (1958), the respondent railroad had been engaged in a deliberate campaign of purchase of the stock of the Central of Georgia and had even purchased a substantial number of shares during the pendency of the investigation case before the Commission. *Id.* at 44, n. 4. *Hoaff - Control - Elliott Brothers Trucking Co., Inc.*, 80 M.C.C. 637 (1959), involved a similar deliberate violation of law by purchase of stock in a second carrier. Both *Black - Investigation of Control - Colony Motor Transportation*, 75 M.C.C. 275 (1958) and *Greyhound Corp. - Investigation of Control - Southern Limited, Inc.*, 45 M.C.C. 59 (1946) involved willful consummation of acquisitions which the Commission had previously disapproved in section 5(2) proceedings. And *Sellers - Control - Huckabee Transport Corp.*, 80 M.C.C. 429, 450 (1959) involved intricate manipulations of money and people, which were "deliberate and worthy of censure in the strongest terms. This record shows how artful a plan was conceived".

[14] The Examiner, having heard the evidence and personally observed the individual appellants, found that the alleged violations were "the result in some cases of ignorance of the requirements, and in others of a degree of carelessness and not willfulness". (J. St. A-72)

vestiture in the *duPont* case certainly does not excuse the Commission's failure to consider whether divestiture was necessary; indeed, the *duPont* decision is an excellent illustration of what the Commission failed to do.

In short, as this Court said in *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 392, "One cannot generalize as to the proper scope of these orders. It depends upon the facts of each case". No amount of citation or argument of counsel [15] is a substitute for the Commission's consideration of and judgment upon the necessity for divestiture in this case.

C.

When the Commission ruled that the section 5(2) merger application would be denied simply because of the fact that a violation of section 5(4) had been found and regardless of whether or not that violation was innocent,[16] it was not

---

[15] Appellants have suggested that the Commission should have considered the fact that "[t]here is no possible reason why severance of Kenneth's connections with either carrier would not be a fully effective remedy. Thus it would have been entirely sufficient 'to prevent continuance of such violation', to order Kenneth and Nelson Co. to terminate whatever 'relationship' the Commission found to exist and or to enjoin control or management in a common interest (as both Division 4's order and one paragraph of the Commission's order actually did)." (J. St. 33) Or, of course, the Commission might have chosen the alternative of a voting trust, which it employed in *Central of Georgia Ry. Co. Control*, 307 I.C.C. 39 (1958).

Appellees' counsel have alleged in their Motion (p. 13) that "[i]n view of the close relations between the appellants, and their illegal common activities heretofore, . . . [appellants' suggested alternative] would be ineffective to cure the violations found." But appellants respectfully submit that whether the suggested alternative (or some other alternative) would be effective or not is a decision to be made and explained by the Commission, in whom Congress vested discretion, not by appellees' counsel.

[16] Despite the Examiner's finding that appellants did not willfully violate the law (see note 14 *supra*), appellees' argument assumes "[t]he evident *purpose* . . . of such violation". (Motion 14) (Emphasis added.)

merely weighing the violation of law together with the mandatory considerations specified by the statute (section 5(2)(c)) as it has done in the past.[17] In the present case the Commission weighed no other criteria, for it held that the finding of violation of law conclusively required denial of the application. This rejection of all factors but one clearly was error, *cf. Interstate Commerce Commission* v. *J-T Transport Company, Inc.*, 368 U.S. 81, 88-90, and required the District Court to remand the case to the Commission, *cf. Schwabacher* v. *United States*, 334 U.S. 182, 201-202.

Moreover, appellees' argument that section 5(4) was "aimed" at barring mergers simply because they were "premature", i.e., prior to Commission approval (Motion 14-15), is based upon a mistaken concept of section 5(4). It is clear that all parts of section 5 of the Interstate Commerce Act were designed to promote the National Transportation Policy, *County of Marin* v. *United States*, 356 U.S. 412, 416-18; *Schwabacher* v. *United States*, 334 U.S. 182, 194 & n. 14; see 54 Stat. 899, and the particular role of section 5(4) was to forbid mergers which were inconsistent with the National Transportation Policy and the public interest. See *Hearings on H.R. 9059 Before the House Committee on Interstate and Foreign Commerce*, 72d Cong., 1st Sess. at 19-26. Inasmuch as a merger pre-

[17] See *Central of Georgia Ry. Co.*, 307 I.C.C. 39, 41 (1958) (proposed acquiring carrier's financial condition and effect upon service and traffic interchange weighed); *Black - Investigation of Control - Colony Motor Transportation*, 75 M.C.C. 275, 282-83 (1958) (near-dormancy of rights to be acquired weighed); *Hough - Control - Elliott Brothers Trucking Co., Inc.*, 80 M.C.C. 637 (1959) and *Powell - Purchase - Rampy*, 57 M.C.C. 597 (1951) (each weighing a long history of criminal violations, the former also considering apparent dormancy and lack of need for service, and the latter also considering proposed vendee's unprofitable operations of rights involved under a lease); *Selters - Control - Huckabee Transport Corp.*, 80 M.C.C. 429 (1959) (considering deterioration of proposed vendor's financial condition while controlled by proposed vendee under temporary authority).

maturely carried out may nevertheless be in the public interest and desirable to promote the National Transportation Policy, it is obvious that the Commission, by its preoccupation with "prematurity" to the exclusion of all other considerations, is acting contrary to the intent of Congress and the express language of the Interstate Commerce Act.

Conclusion

Appellants respectfully submit that the questions presented by this appeal are substantial and important questions which should be resolved by this Court after full argument and by reversing the decision of the District Court.

Respectfully submitted,

Henry E. Foley
Loyd M. Starrett
William G. Buss, Jr.
10 Post Office Square
Boston 9, Massachusetts
Counsel for Appellants.

Mary E. Kelley
10 Tremont Street
Boston 8, Massachusetts
Of Counsel